119-502

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1195. 787

CHARLES H. BROOKS, PLAINTIFF IN ERROR,

vs.

EDWARD S. CLARK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED NOVEMBER 3, 1885.

SUPREME COURT OF THE UNITED STATES.

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No. 1195

CHARLES H. BROOKS, PLAINTIFF IN ERROR,

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

EDWARD S. CLARK
vs.
CHARLES H. BROOKS and JOSIAH D. BROOKS, Surviving Partners of D. Leeds Miller, Deceased, late Trading as Brooks, Miller & Co.

UNITED STATES OF AMERICA, *Eastern District of Pennsylvania,* } *ss:*

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April session, 1885. No. 26.

It is thus contained:

2 Be it remembered that on the twenty-third day of May, in the year of our Lord one thousand eight hundred and eighty-five, Charles H. Brooks, by his attorney, John G. Johnson, Esquire, comes into court here and files an exemplification of the record and proceedings of the court of common pleas No. 1 for the county of Philadelphia, State of Pennsylvania, at No. 823, December term, 1884, in the words following, to wit:

3 UNITED STATES, *Eastern District of Pennsylvania,* } *sct:*

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, Greeting:

Because that in the record and process and also in the rendering of judgment remanding a suit before you, between Edward S. Clark, a citizen of the State of Pennsylvania, plaintiff, and Charles H. Brooks, a citizen of the State of New York, who was sued with Josiah D. Brooks, a citizen of the State of Pennsylvania, surviving partners with D. Leeds Miller, dec'd, trading as Brooks, Miller & Co., defendant in a plea of trespass on the case, a manifest error has intervened to the great damage of the said Charles H. Brooks, as in his complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States sitting at Washington, D. C., on the eleventh day of November next, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this fourteenth day of October, A. D. one thousand eight hundred and eighty-five,

and in the one hundred and tenth year of the Independence of the said United States.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

SAMUEL BELL,
Clerk of Circuit Court U. S.

Allowed.
WM. BUTLER, *Judge.*

Security to be entered in the sum of five hundred dollars.

4, 5, & 6 THE UNITED STATES OF AMERICA, *ss:*

To Edward S. Clark, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the eleventh day of November next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein Charles H. Brooks and Josiah D. Brooks, surviving partners of D. Leeds Miller, deceased, late trading as Brooks, Miller and Company, are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 27th day of October, in the year of our Lord one thousand eight hundred and —.

WM. BUTLER, *Judge.*

I accept service for def't in error & clerk will enter my appearance accordingly.

PIERCE ARCHER.

7 *Exemplification.*

PHILADELPHIA COUNTY, } *sct:*
State of Pennsylvania, }

Among the records and proceeding of the court of common pleas No. 1 for the county of Philadelphia, State of Pennsylvania, the following may be found as matter of file and of record at No. 823, Dec. term, 1884, to wit:

Docket Entries. December Term, 1884.

P. Archer. 823. Edward S. Clark *vs.* Charles H. Brooks and Josiah D. Brooks, surviving partners of D. Leeds Miller, dec'd, late trading as Brooks, Miller & Co.

Jan'y 12, 1885. Aff't of loan and copy of account filed.
May 2, 1885. Aff't of defence of Chas. H. Brooks filed.
Sum's case.
Exit Dec. 31, 1884.
Ret. 1 Mon. Jan'y, 1885.

Service accepted as to Josiah D. Brooks and service accepted for Chas. H. Brooks, with like force and effect as if the writ had been

issued ret'd to the first Monday of April and had been served on or before the first Monday of March.

8 Jan'y 26, 1885. Judg't for want of an aff. of defense against Josiah D. Brooks only.

Eo die. Dam's ass'd @ $15,210.00.

May 2, 1885. Petition of Chas. H. Brooks for leave to remove case to circuit court U. S.

Eo die. Bond filed.

9 *Issue Summons.*

EDWARD S. CLARK

vs.

CHARLES H. BROOKS & JOSIAH D. BROOKS, Surviving Partners of D. Leeds Miller, Dec'd, late Trading as Brooks, Miller & Co.

Case ret'ble first Monday of January, 1885.

PIERCE ARCHER,
Dec., 1884. *Pl'ff's Att'y.*

(Endorsed:) 823. Dec. T., 1884. C. P. 1. Edward S. Clark *vs.* Brooks, Miller & Co. Order for summons case. Filed Dec. 31, 1884. F. C. Manderson. Archer.

10 *Summons.*

COUNTY OF PHILADELPHIA, *ss:*

[SEAL.] The Commonwealth of Pennsylvania to the sheriff of the county of Philadelphia, Greeting:

We command you that you summon Charles H. Brooks and Josiah D. Brooks, surviving partners of D. Leeds Miller, dec'd, late trading as Brooks, Miller & Co., late of your county, so that they be and appear before our judges, at Philadelphia, at our court of common pleas, No. 1, for the county of Philadelphia, to be holden at Philadelphia, in and for said county of Philadelphia, the first Monday of January next, there to answer Edward S. Clark of a plea of trespass on the case, etc.; and have you then [and] there this writ.

Witness the Honorable Joseph Allinson, president of our said court at Philadelphia, the 31st day of December, in the year of our Lord, one thousand eight hundred and eighty-four.

F. C. MANDERSON,
Pro Prothonotary.

11 [Endorsed:] 823. Dec. Term, 1884. C. P., No. 1. Edward S. Clark *vs.* Charles H. Brooks and Josiah D. Brooks, surviving partners. Summon. Case. Archer.

I accept service of within writ.

JOSIAH D. BROOKS.

I accept service of the writ for Chas. H. Brooks, with like force and effect as if the writ had been issued ret'd to the first Monday of April and had been served on or before the first Monday of March. 3 D., 1885.

JOHN G. JOHNSON,
Att'y — Ch. H. Brooks.

12 C. P. 1. D., '84.

CLARK
vs.
C. H. BROOKS and JOSIAH D. BROOKS, Surviving Partner of D. Leeds Miller, Late Trading as Brooks, Miller & Co. } 823.

COUNTY OF PHILADA., *ss:*

Edward S. Clark being duly sworn, says that he is the plaintiff in the above case and is a creditor of the said firm, defendants, for money loaned by the plaintiff to said firm, defendants, from time to time in various amounts, aggregating in all the sum of fifteen thousand five hundred dollars, on account of which the defendants paid the plaintiff on December 30, 1876, the sum of 500 of the principal of the loan, leaving a balance due, as per statement on
13 the books of the said defendants, on said date, on December 30, 1876, of principal of said loan of $15,000, due by the said firm to plaintiff. That the terms of said loan were that said moneys where to be repaid on demand by plaintiff as he desired the same from time to time, the defendants paying him the market rates of interest therefor, say, 6 @ 6½ per centum or thereabouts, as the market rate varied. That the principal balance of said loan, as appears on the defendants' books, due to the plaintiff December 30, 1876, is therein stated and settled at the nett sum of $15,000 aforesaid, which they agreed to repay on demand, with interest as aforesaid. That they continued to pay interest thereon thereafter for a long time, but have never paid the principal sum of $15,00 aforesaid, or
14 any part thereof, but owe the same, together with interest, according to the annexed account taken from the books of the said defendants' firm (Brooks, Miller & Co.), showing the last payment of interest to be on 5, 3, '84 to 10, 31, '84, since which nothing has been paid; but all previous accounts of interest due up to 1884 have been fully paid by said Brooks, Miller & Co.; and further deponent saith not.

EDWARD S. CLARK.

Sworn & subscribed to before me January 12, 1885.
[SEAL.]
JOS. J. FARLEY,
Notary Public.

15 *"Copy of Account from Defendants' Books."*

E. S. Clark. Loan.

Cr. By											15,500 00
Dr. To cash				12,	30,	'76					500 00
Sept. 4, 1884											15,000 00
Dr. to cash	interest	paid		11,	22,	'76, to	3,	1,	'77		351 33
"	"	"	"	3,	8,	'77, to	7,	1,	'77		337 50
"	"	"	"	7,	2,	'77, to	11,	1,	'77		345 00
"	"	"	"	11,	5,	'77, to	3,	1,	'78		337 50
"	"	"	"	4,	9,	'78, to	7,	1,	'78		342 50
"	"	"	"	7,	5,	'78, to	11,	1,	'78		345 00
"	"	"	"	12,	10,	'78, "	3,	1,	'79		337 50
"	"	"	"	3,	17,	'79, "	7,	1,	'79		342 50
"	"	"	"	7,	1,	'79, "	11,	1,	'79		307 50
"	"	"	"	11,	1,	'79, "	3,	1,	'80		302 50
"	"	"	"	2,	16,	'80, "	7,	1,	'80		305 00
"	"	"	"	7,	1,	'80, "	11,	1,	'80		307 50
"	"	"	"	11,	19,	'80, "	3,	1,	'80		300 00
"	"	"	"	3,	7,	'81, "	7,	1,	'81		305 00
"	"	"	"	7,	1,	'81, "	11,	1,	'81		307 50
"	"	"	"	11,	2,	'81, "	3,	1,	'82		300 00
"	"	"	"	2,	27,	'82, "	7,	1,	'82		305 00
"	"	"	"	6,	30,	'82, "	11,	1,	'82		307 50
"	"	"	"	12,	2,	'82, "	3,	1,	'83		300 00
"	"	"	"	3,	9,	'83, "	7,	1,	'83		305 00
"	"	"	"	7,	2,	'83, "	11,	1,	'83		307 50
"	"	"	"	10,	29,	'83, "	3,	1,	'84		302 50
"	"	"	"	3,	1,	'84, "	4,	30,	'84		152 50
"	"	"	"	5,	3,	'84, "	10,	30,	'84		460 00
											$7,613 83

16 (Endorsed:) 823. Dec. term, 1884. Edward S. Clark *vs.* Brooks, Miller & Co. C. P. 1. Plaintiff's affidavit of loan and copy of ac. from def'ts' books. Filed Jan. 12, 1885. W. H. Leeds, P. Archer.

17 C. P. No. 1. Dec. T., 1884.

CLARK *vs.* BROOKS *et al.* } No. 823.

1885.

And now, on motion of Pierce Archer, Esq., the court enter judgment against the defendants for want of an affidavit of defence.

(Endorsed:) 823. Dec. T., 1884. C. P. No. 1. Clark *vs.* Brooks *et al.* Motion for judgment. Filed Jan. 26, 1885. Turnbull, pro proth'y. Granted. D. Archer.

18 C. P. No. 1. Dec. T., 1884.

CLARK
vs. } No. 823.
BROOKS *et al.*

I assess damages as follows:

Real debt	$15,000 00
Int. from 10, 30, '84, to 1, 24, '85	210 00
	$15,210 00

J. KENDERDINE,
Pro Proth'y.

Endorsed: 823. Dec. T., 1884. C. P. No. 1. Clark *vs.* Brooks *et al.* Assessment of damages. Filed Jan. 26, 1885. Turnbull, pro proth'y. Archer.

19 *Judgment Index.*

Defendant.	Plaintiff.	Court.	Term.	No.	Att'y.	Date.	Amount.
Brooks, Chas. H. Brooks, Josiah D.	E. S. Clark.	No. 1.	D. '84.	823	Archer.	1885. Jan'y 26.	$15,210

20 PHILADELPHIA CITY, *ss:*

C. P. No. 1. Dec. T., 1884.

CLARK
vs. } No. 823.
BROOKS, MILLER & CO.

Charles H. Brooks, being duly sworn, deposes and says:

I have a just and true defense to the whole of the claim sued upon of the nature and character following:

Until about the 31st day of December, 1879, in conjunction with Josiah D. Brooks and D. Leeds Miller, I was a member of the firm Brooks, Miller & Co.

The plaintiff was a friend of D. Leeds Miller, and from time to time, at the solicitation of said Miller, and quite as much for his own accommodation and benefit as for that of the firm, had deposited moneys to him belonging with the firm. A part of
21 these was returned to him, leaving due to him in or about the year 1876 the sum of fifteen thousand dollars. For this sum a due-bill of the firm was given by said Miller to the plaintiff, which due-bill was in his possession as evidence of the firm indebtedness to him on the 31st day of December, 1879.

Shortly prior to said last-mentioned date said D. Leeds Miller proposed to deponent to continue in business with him, and told him

that he would contribute to the firm as his share of capital the sum of $15,000, being the amount due to plaintiff, which, as said Miller told him, the plaintiff had agreed to loan to him individually. The proposal of said Miller was declined, and it was afterwards agreed between Miller and Josiah D. Brooks that they would con-
22 tinue in partnership under the firm name of Brooks, Miller & Co., and that they would purchase deponent's interest in the old firm, paying him therefor the sum of $29,749.40, and that they would assume and pay all its debts.

The agreement to assume said debts and to pay deponent said sum for his said interest was made with him on said 31st day of December, 1879. The firm was thereupon dissolved as of the date of 31st December, 1879, and the fact of said dissolution was fully advertised; after said date deponent ceased to be a member of the firm, or to be in any way interested therein.

The firm at the time of dissolution was absolutely solvent and fully able to pay all its debts. The sum agreed to be paid to him by said new firm for this interest was duly paid to him.

23 Deponent believes and expects to be able to prove that all the facts connected with said dissolution, including the fact of his withdrawal from the firm, and the assumption of all the debts of the old firm by the new firm were fully known to the plaintiff at or about the time of said dissolution.

Deponent is informed, believes, and expects to be able to prove, that the plaintiff subsequently agreed with said D. Leeds Miller to cancel the due-bill which had been given to him by the old firm, and to accept in lieu thereof the due-bill of the new firm, composed, as he knew, solely of Josiah D. Brooks and D. Leeds Miller, and thus and thereby to release the deponent from all further obligation
24 and liability to him; and that in pursuance of said agreement and with the intent thus to release all liability of deponent the said plaintiff did cancel and surrender the old due-bill, and did accept in full payment and satisfaction of the same the due-bill of the new firm.

For many years the interest on said due-bill was duly paid by the new firm; no demand was ever made upon deponent for the principal or the interest until shortly before the bringing of this suit and until after the failure, in or about August, 1884, of the said new firm or of the succession thereof, that his liability had been fully cancelled and released; he still remains in this belief.

Deponent believes all the above facts to be true, and he expects to prove all of them on the trial of the cause. They are
25 all stated upon actual knowledge, or upon information and belief.

CHARLES H. BROOKS.

Sworn to and subscribed before me this second day of May, A. D. 1885.

[SEAL.] GEORGE HOUSE,
Notary Public.

(Endorsed:) 823. Dec'r, 1884. C. P. No. 1. Clark *vs.* Brooks. Affr. of defence of Chas. H. Brooks. Filed May 2, 1885. J. Kinderdine. John G. Johnson.

26 In the Court of Common Pleas No. 1 for the County of Philadelphia. Dec. Term, 1884.

EDWARD S. CLARK
vs.
CHARLES H. BROOKS and JOSIAH D. BROOKS, Surviving Partners of D. Leeds Miller, Dec'd, Late Trading as Brooks, Miller & Co. } No. 823.

To the honorable the judges of the said court:

The petition of Charles H. Brooks, defendant above named, who was sued with Josiah D. Brooks as surviving partners, &c., respectfully represents:

That the controversy in this suit is between citizens of different States. That your petitioner was at the time of the com-
27 mencement of this suit and still is a citizen of the State of New York, and that the said plaintiff, Edward S. Clark, was then and still is a citizen of the State of Pennsylvania, and that the matter and amount in dispute in the said suit exceeds exclusive of costs the sum or value of five hundred dollars.

Your petitioner herewith offers a bond, with good and sufficient surety, conditioned for his entering in the circuit court of the United States in and for the eastern district of Pennsylvania on the first day of its next session a copy of the record in this suit and for the payment of all costs that may be awarded by said circuit court, if the said court shall hold that this suit was wrongfully or improperly removed thereto. He therefore prays this honorable court to proceed no further therein except to make the order of removal
28 required by law and to accept the said bond and surety and cause the record therein to be removed to the said circuit court.

And he will ever pray, &c.

CHARLES H. BROOKS.

PHILADELHIA COUNTY, *ss:*

Personally appeared Charles H. Brooks, who being duly sworn, says that the facts set forth in the above petition are true to the best of his knowledge and belief.

CHARLES H. BROOKS.

Sworn and subscribed to before me this 28th day of April, 1885.
[SEAL.] GEORGE HOUSE.
Notary Public.

(Endorsed:) 823. D. 1884. C. P. No. 1. Clark *vs.* Brooks *et al.* Petition for leave to remove above case to the United States circuit court. Filed May 2, 1785. C. B. Roberts, pro proth'y. Jno. G. Johnson.

29 Know all men by these presents, that we, Charles H. Brooks and Joshua L. Bailey, are held and firmly bound unto Edward S. Clark in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Edward S. Clark, certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, and every of them, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the twenty-ninth day of April, in the year of our Lord one thousand eight hundred and eighty-five (1885).

The condition of this obligation is such that if the above-bounded Charles H. Brooks, who, with Josiah D. Brooks, is a defendant in a certain action now pending in the court of common pleas
30 No. 1 for the county of Philadelphia, to December term, 1884, No. 823, at the suit of the said Edward S. Clark, and who has petitioned the said court for a removal of the said suit into the circuit court of the United States in and for the eastern district of Pennsylvania, shall enter in the said circuit court on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by the said circuit court, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

CHARLES H. BROOKS. [SEAL.]
JOSHUA L. BAILEY. [SEAL.]

Sealed and delivered in the presence of—
GEO. W. WILLIS,
As to Charles H. Brooks.
FRED'K SUNHART,
As to Chas. H. Brooks.

DAVID STRODE,
T. M. BROWNING,
Witnesses as to signature of Joshua L. Bailey.

31 Endorsed: 823. D., 1884. C. P. No. 1. Clark *v.* Brooks *et al.* Bond for removal of above case to the United States circuit court. Filed May 2, 1885. C. B. Roberts, pro proth'y. John G. Johnson.

32 COMMONWEALTH OF PENNSYLVANIA, } ss:
Philadelphia County, }

I, Wm. B. Mann, prothonotary of the court of common pleas No. 1, in and for said county, certify that the foregoing is a full and correct copy of the whole record of the case herein stated, wherein Edward S. Clark, plaintiff, and Charles H. Brooks and Josiah D. Brooks, surviving partners of D. Leed Miller, dec'd, late trading as Brooks, Miller & Co., defendants, as the same remains of record before the said court, at No. 823 of December term, A. D. 1884.

In testimony whereof I have have hereunto set my hand and affixed the seal of the said court the 18th day of May, A. D. 1885.

[SEAL.] F. H. SMITH,
Pro Prothonotary.

33 (Endorsed:) 286. April sess., 1885. U. S. circuit court. Edward S. Clark *vs.* Chas. H. Brooks *et al.*, sur. partner, &c. Copy of record in common pleas. Filed May 23, 1885. John G. Johnson.

34 And afterwards, to wit, on the eighth day of September, A. D. 1885, the plaintiff, by his attorney, Pierce Archer, Esq., comes into court here and moves for a rule to show cause why an order should not be made remanding said cause from this court to the said State court, in the following words, to wit:

U. S. C. C. April T., 1885. C. P. No. 1. Dec. T., 1884.

EDWARD S. CLARKE
vs. } No. 26.
CHARLES H. BROOKS,
and
JOSIAH D. BROOKS, Surviving Partners of D. Leeds Miller, dec'd, late trading as Brooks, Miller & Co. } No. 823.

And now, September 8th, 1885, the pl'ff, by his attorney, Pierce Archer, moves for a rule to show cause why an order should not be made remanding the said cause from the said circuit court to
35 th said State court, to wit, *to* the court of common pleas No. 1 of Philadelphia, Pennsylvania, as of December term, 1884, No. 823.

And it appearing by inspection of the record that the defendants are not both citizens of another State than the plaintiff, and that the said Josiah D. Brooks is a citizen of Pennsylvania, the said rule to show cause is granted, returnable Tuesday, September 15, 1885.

(Endorsed:) 26. Ap'l T., 1885. U. S. C. C. Clark *vs.* Brooks *et al.* Rule to show cause why cause should not be remanded from U. S. C. C. to C. P. No. 1 of Phila. Co. Ret'ble Tuesday, Sept'r 15, 1885. Filed Sep. 8, 1885. P. Archer, for pl'ff.

36 And afterwards, to wit, on the 22nd day of September, A. D. 1885, come the parties aforesaid, and this cause being called for argument on motion for a rule to remand, and having been argued by counsel for the respective parties and duly considered, the court takes further time for consideration.

And afterwards, to wit, on the 6th day of October, A. D. 1885, the court having fully considered the matter, orders that the said rule to remand be made absolute and the cause remanded.

37 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit. April Sess., 1885.

EDWARD S. CLARK,
vs.
CHARLES H. BROOKS and JOSIAH D. BROOKS, Surviving Partners of D. Leeds Miller, Dec'd, Late Trading as Brooks, Miller & Co. } No. 26.

Know all men by these presents that we, Charles H. Brooks, 19 & 21 Thomas St., New York city, William H. Jenks, 115 Chestnut St., Phila., and Frederick L. Baily, No. 210 Chestnut St., Philadelphia, are held and firmly bound unto Edward S. Clark in the full and just sum of five hundred dollars, to be paid to the said Edward S. Clark, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of October, A. D. 1885.

Whereas lately at a term of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in said court between said Edward S. Clark and said Charles H. Brooks *et al.*, judgment remanding said suit to the court of common pleas was rendered against the said Chas. H. Brooks, and the said Chas. H. Brooks having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said Edward S. Clark, citing and admonishing him to be and appear at a Su-

38 preme Court of the United States to be holden at Washington the eleventh day of November next ensuing:

Now, the condition of the above obligation is such that if the said Charles H. Brooks shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES H. RROOKS. [SEAL.]
WM. H. JENKS. [SEAL.]
FREDERICK L. BAILY. [SEAL.]

Sealed and delivered in presence of—
SAMUEL BELL.
E. G. HAMERSLY.

Sureties approved.

WM. BUTLER, *Judge.*

[Endorsed:] No. 26. April sess., 1885. Circuit court United States. Clark *vs.* Brooks *et al.* Bond sur writ of error.

39 UNITED STATES OF AMERICA, } *set:*
Eastern District of Pennsylvania, }

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third cir-

cuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of Edward S. Clark *vs.* Charles H. Brooks and Josiah D. Brooks, surviving partners of D. Leeds Miller, deceased, late trading as Brooks, Miller & Co., April session, 1885, No. 26, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 27th day of October, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and tenth.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

SAMUEL BELL,
Clerk of C. C.

Endorsed on cover: E. Pennsylvania C. C. U. S. No. 1195. Charles H. Brooks, plaintiff in error, *vs.* Edward S. Clark. Filed November 3, 1885.

119-502

FILED
AUG 2 1886
JAMES H. MCKENNEY,
CLERK.

No. 1195. *October Term, 1885.*

Supreme Court of the United States.

CHARLES H. BROOKS,
Plaintiff in Error,

vs.

EDWARD S. CLARK,
Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

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FRANK P. PRICHARD,
JOHN G. JOHNSON,
For Plaintiff in Error.

Allen, Lane & Scott, Printers, Nos. 229 and 231 South Fifth Street, Philadelphia.

I. Statement of the Case.

On December 31st, 1884, Edward S. Clark, a citizen of Pennsylvania, brought in the Court of Common Pleas, No. 1, of Philadelphia county, a joint action against Charles H. Brooks, a citizen of New York, and Josiah D. Brooks, a citizen of Pennsylvania. Josiah D. Brooks voluntarily accepted service of the summons, and on January 26th, 1885, without any service on the other defendant, a final and separate judgment for $15,210 was entered against said Josiah D. Brooks, under a State statute which allows a separate and final judgment against one defendant without prejudicing the right of plaintiff to proceed and obtain a judgment against a co-defendant. After the entry of this judgment against Josiah D. Brooks, the other defendant, Charles H. Brooks, voluntarily appeared by his attorney and accepted service of the summons as if it had been issued returnable to the first Monday of April. He also filed an affidavit of defense, setting up a defense which applied to himself alone, and on the same day removed the case to the United States Circuit Court, upon the ground of citizenship. The latter court remanded the case, being of opinion that notwithstanding final judgment had been entered against Josiah D. Brooks before the appearance of his co-defendant, he was still a party to the controversy. To reverse this ruling the present writ of error is taken.

II. Specifications of Error.

1. The learned court erred in making absolute the rule to remand the case to the State court.

2. The learned court erred in remanding the case to the State court.

III. Argument.

It may be well to state at the outset that appellant does not seek to attack or qualify the recent decisions of this court that an original joint cause of action does not become separated into several controversies simply because the defendants sever in their pleadings and defenses. A careful examination of the cases on this subject will show that they group themselves into three classes, viz:—

First.—Where no judgment has been entered, but separate defenses have been raised by the defendants. In such cases one defendant cannot remove, because the plaintiff can still elect to treat the controversy as joint. Louisville and Nashville Railroad *vs.* Ide, 114 U. S., 52, is an example of this class.

Second.—Where the plaintiff has entered an interlocutory judgment by default against one defendant. In such cases the other defendant cannot remove, because the final judgment will still be joint, and the defendant against whom the interlocutory judgment was entered remains interested in and will be affected by the final judgment. Putnam *vs.* Ingraham, 114 U. S., 57, is an example of this class.

Third.—Where a final judgment has been rendered against one defendant. In such cases the other defendant can remove, because the defendant against whom final judgment has been entered has been thus removed from the controversy, and is no longer interested in or affected by the result of the controversy with his co-defendants. Yulee *vs.* Vose, 99 U. S., 539, is an example of this class.

The distinction between these classes of cases is not an accidental one, but is a logical result of a connected and consistent train of reasoning. The opinions in all of the three cases above cited were delivered by the same judge (Chief Justice Waite.)

In the first case above cited (R. R. Co. *vs.* Ide) he says: "Separate answers by the several defendants sued on joint "causes of action may present different questions for deter-

"mination, but they do not necessarily divide the suits into "separate controversies. A defendant has no right to say "that an action shall be several *which a plaintiff elects to make "joint.*" In the second case (Putnam *vs.* Ingraham) he says: "The fact that Morgan has not answered but is in default is "unimportant. The suit is still on joint causes of action, and "the plaintiff, if he sustains the allegations of his complaint at "the trial, *will be entitled to a joint judgment against all the "defendants.*" In the third case (Yulee *vs.* Vose) he says: "It "also appeared that the controversy, so far as it concerned "Yulee, not only could be, *but actually had been by judicial de-"termination*, separated from that of the other defendants. "This, as we think, gave Yulee a right to the transfer "of his part of the suit to the Circuit Court." This distinction is in accord with the principles laid down in the Removal Cases, 100 U. S., 457, where it was held that if there had been a decree which settled the controversy finally as to one defendant so that he was no longer interested in the result against the other, that other could remove the case, the same learned judge whose words have been already quoted saying, "Before the trustees of the "mortgage were actually brought into court by service of pro-"cess the dispute between the construction company and the "railroad company had been finally disposed of. The amount "due the construction company had been ascertained so far as "that company and the railroad company were concerned; the "mechanics' lien established and the property sold under the "lien to pay the debt. There was after that nothing left of the "suit except that part which related solely and exclusively to "the priority of the mortgage lien, and as to this the contro-"versy was between the construction company on the one side "and the mortgage trustees on the other. If the railroad com-"pany still continued a party to the suit, it was a nominal party "only, and its interests were in no way whatever connected with "those of the trustees."

It seems unnecessary to elaborate this point further. Under the above decisions it would seem clear that if before Charles H. Brooks accepted service of the summons, the con-

troversy had, as to Josiah D. Brooks, been ended by a final judgment for an ascertained sum, so that he would not be a party to, or interested in, the result of the subsequent litigation with Charles H. Brooks, the latter had not only a separable but a separated controversy which he could remove.

We will, therefore, turn our attention to the only remaining question, viz.: Was the judgment against Josiah D. Brooks a final judgment as to him which removed his interest in the subsequent litigation with Charles H. Brooks.

The judgment against Josiah D. Brooks was not entered upon common law pleadings, but under a special statute of Pennsylvania (Act 28th March, 1835, Sect. 2, P. L., 89), which provides as follows :—

"In all actions instituted in the said courts on bills, notes, "bonds or other instruments in writing, for the payment of "money and for the recovery of book-debts; in all actions of "*scire facias* on judgments and on liens of mechanics and ma- "terialmen, under the act of 17th of March, 1806, and the "various supplements thereto, it shall be lawful for the plain- "tiff, on or at any time after the third Saturday succeeding the "several return-days hereinbefore designated, on motion, to "enter a judgment by default, notwithstanding an appearance "by attorney, unless the defendant shall previously have filed "an affidavit of defense, stating therein the nature and charac- "ter of the same: *Provided*, That in all cases no judgment shall "be entered by virtue of this section, unless the said plaintiff "shall, within two weeks after the return of the original pro- "cess (have) filed in the office of the prothonotary of the "court hereby erected, a copy of the instrument of writing, "book-entries, record or claim on which action has been "brought."

and the supplemental act of 11th March, 1836, section 14 (P. L. 76), which provides :—

"The provisions of the second section of the act to which "this is a supplement, which provides for the taking judg- "ments by default, shall be and the same are hereby extended "to all actions brought on contracts for the loan or advance of "money, whether the same be reduced to writing or not: *Pro-*

"*vided*, That in all such cases no judgment shall be entered by "virtue of this section, unless the plaintiff shall, within two "weeks after the return of the original process, file in the "office of the prothonotary of the said court, an affidavit, set-"ting forth the terms of the said loan or advance, with the "date thereof."

Under these statutes if the defendant does not file an affidavit of defense the plaintiff's counsel moves in open court for judgment, and when that is pronounced prepares an assessment of damages based upon the copy or affidavit of loan filed, and this assessment he files with the prothonotary, who signs and files it of record. This is a final judgment without any writ of inquiry of damages, it having been decided by the Supreme Court of Pennsylvania in

Sellers *vs.* Burk., 11 Wright, 344,

that where the sum claimed is certain and appears upon the record, as it always does under the affidavit of defense law, the judgment is final. Read, J., in his opinion in that case, reviews the history of the practice and, in affirming what had always been understood to be the practice, says: "In 1838 the "District Court made two decisions of great importance which "have always been regarded as sound law. In McClurg *vs.* "Murphy, 2 Miles, 177, the court decided, President Pettit "delivering the opinion, that a judgment for want of an affidavit "of defense by default under the act of March 28th, 1835, is "final and not interlocutory, although the damages have not "been assessed—both as regards lien and execution."

Under the common law, as it was recognized and enforced in Pennsylvania, there could not be, in an action against two defendants on a joint cause of action, two separate final judgments, unless it affirmatively appeared on the record that they were upon entirely different issues. Plaintiff might take an interlocutory judgment against one defendant as *e. g.* a judgment for want of an appearance, and then proceed to obtain a final joint judgment against both, but he could not take a final judgment against one without releasing the other. In

Williams *vs.* McFall, 2 S. & R., 280,

Sergeant, J., says: "In the case under consideration, the "judgment entered against Millington being for a sum certain "cannot be considered in any other light than as a final judg- "ment, and being a final judgment entered against Millington "alone, how can the plaintiffs afterwards proceed to demand "and recover a joint judgment against Millington and McFall, "or a separate final judgment against McFall alone. In a suit "against two there cannot be two final judgments entered, "either each separate, or one separate and the other joint. "Such a proceeding is irregular in the first place, and contra- "dictory in the second."

And in

Ridgely *vs.* Dobson, 3 W. & S., 118–123,

Huston, J., says: "Where two or more are sued, the plain- "tiff must have the case at issue as to all on taking judgment "by default against those who do not plead; when the issue "is tried as to the one who pleads the verdict ascertains "the amount due as well by those who plead as those who "suffered judgment, and the execution issues against all."

This common law rule, as stated in the above decisions, worked considerable hardship. If, for instance, a suit was brought against two on a joint cause of action, but only one was served, the plaintiff must bring in the defendant not served by means of *alias* writs, and in the meanwhile could not proceed to final judgment against the one served without discharging the other. So, also, even if both were served, and one made no defense, the plaintiff could not proceed to final judgment and execution against the latter without releasing his co-defendant. This led to the enactment of two statutes in Pennsylvania. The first was the act of 6th April, 1830 (P. L., 277), which provided that—

"In all suits now pending or hereafter brought in any court "of record in this Commonwealth against joint and several "obligors, copartners, promissors or the endorsers of promis- "sory notes in which the writ or process has not been or may "not be served on all the defendants, and judgment may be ob-

" tained against those served with process, such writ, process " or judgment shall not be a bar to recovery *in another suit* " against the defendant or defendants not served with process."

The second statute was the act of 4th April, 1877 (P. L., 52), which enacted " where judgment has been or may hereafter " be obtained in any court of record of this Commonwealth " against one or more of several co-defendants in default of " appearance, plea or affidavit of defense, said judgment shall not " be a bar to recovery *in the same suit* against the other defend- " ants jointly or jointly and severally liable as co-obligors, co- " partners or otherwise."

The judgment referred to in both these acts was, of course, final judgment, since an interlocutory judgment did not release the co-defendant even at common law.

It is to be observed also that the second statute, though following the first after a long interval, was really the logical result of it, since the objection of the common law to two final judgments was the danger of inconsistency, and it is no more inconsistent to allow of different judgments on the same cause of action in the same suit, than to allow of different judgments on the same cause of action in different suits. Both were passed to facilitate justice and relieve suitors from the embarrassment caused by the common-law doctrine.

Bearing these statutes in mind, let us now examine the facts of this case. The suit was brought in the State court against Josiah D. Brooks and Charles H. Brooks, on a joint cause of action. Plaintiff filed his affidavit of loan in accordance with the act of 1836. When the return day arrived, the original summons was returned with service accepted by Josiah D. Brooks, but with no service on Charles H. Brooks. Josiah D. Brooks not putting in any affidavit of defense, plaintiff, under the act of 1830, above cited, which gave him a right to take judgment against the party served, asked for and obtained final judgment against Josiah D. Brooks, the party served, and filed an assessment of damages against him which was duly signed by the prothonotary. The case then stood as a case which had been

brought against two, with service only on one and final judgment against the party served for a determinate amount.

Afterward Charles H. Brooks, the other defendant, who was a resident of New York, appeared on the scene. He had a separate defense, personal to himself, and was willing to voluntarily appear to have it tried. If the act of 4th April, 1877, above cited, had not been passed it would have been necessary for the plaintiff to have brought a new suit in which Charles H. Brooks could have accepted service, since the prior act of 1830 only allowed a recovery against the defendant not served "*in another suit.*" But as the act of 1877 had altered the law so as to allow a judgment "*in the same suit*" there was no necessity for new process, and Charles H. Brooks merely accepted service of the original summons as if it had been issued returnable at a return day after the date of the judgment against Josiah D. Brooks. He then filed his affidavit of defense and his petition for removal. The case then stood thus—A suit against two in which one alone was served; a final judgment against the one served for a determinate amount; a subsequent appearance of the other defendant and a separate issue with him in which he was debarred by the act of 1877 from setting up the previous final judgment against his co-defendant. Now let us apply the principle laid down by this court in the cases already cited. Before any service on Charles H. Brooks there had been a judicial determination of the suit as to Josiah D. Brooks which as to him put an end to the controversy. That judgment could not be affected by any subsequent judgment against his co-defendant either in the same or in another suit. Afterwards a new controversy was put in issue by Charles H. Brooks which, whether in the same or in another suit, could not be affected either in his favor or against him by the result previously reached against his co-defendant. If in this controversy a judgment should be rendered for or against Charles H. Brooks, it would be for or against him alone, and Josiah D. Brooks would not be a party to it. This becomes very clear if we suppose that on February 3 Charles H. Brooks, instead of appearing in the original suit,

had appeared in a new suit brought against him on the same cause of action. No one would for a moment pretend that this was not a separate controversy. The effect, however, of subsequent proceedings in *the same suit* under the act of 1877 is precisely the same as subsequent proceedings in a new suit under the act of 1830. In both cases there is a final judgment as to one. In both there is a subsequent proceeding against the other not affected by the previous judgment.

In this case there is no mere severance in the pleadings, leaving the plaintiff at liberty to still treat the action as a joint one. The plaintiff has already elected to separate the controversies by taking final judgment against the defendant served before the other defendant appeared; nor is this the case of an interlocutory judgment by default for want of an appearance, since the judgment against Josiah D. Brooks was a final one for a determinate amount. It is, however, within the third class of cases mentioned at the head of this brief, a case in which one defendant has been separated by a final judgment, leaving a controversy with his co-defendant to which he is no longer a party.

It may be said that Josiah D. Brooks may appeal, but to such appeal Charles H. Brooks would be no party. The statute allowing separate judgments must necessarily contemplate separate appeals which shall not interfere with the proceedings against the other defendants. In fact the statute has placed such judgments in the same position as separate judgments at common law upon different issues.

Further argument would seem to be unnecessary. The judgment of the Circuit Court amounts to this: That a controversy with a defendant who was not served until after the suit had been finally ended as to his co-defendant—a controversy in which the jury will be sworn to try the issue as against him alone—a controversy in which the judgment will be for or against him alone, and will not affect any other person—is yet not a separable controversy because it arises in a suit in which another person was originally a joint defendant. It is submitted that this judgment cannot be sustained without overturning the doctrine of

the Removal Cases, and the other decisions of this court which have furnished a guide to the profession in interpreting the act of 1875.

FRANK P. PRICHARD,
JOHN G. JOHNSON.
For Plaintiff in Error.

IV. Agreement of Counsel.

In order that there may be no misunderstanding from any apparent conflict between different parts of the record in the above case, it is agreed that the original summons against both defendants issued on December 31st, 1884, and was returnable the first Monday of January, 1885, at which time Josiah D. Brooks alone accepted service; that on January 26th, 1885, judgment was entered against Josiah D. Brooks alone for $15,210; that on February 3d, 1885, Charles H. Brooks accepted service of the original summons issued against Josiah D. Brooks and Charles H. Brooks, and on May 2d, filed an affidavit of defense and the petition for removal.

119-502

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No. 1295. October Term, 1886.

Supreme Court of the United States.

CHARLES H. BROOKS—BROOKS, MILLER & CO.,
Plaintiffs in Error,

vs.

EDWARD S. CLARK,
Defendant in Error.

Error to Circuit Court, Eastern District of Pennsylvania.

BRIEF OF PIERCE ARCHER,
Counsel for Defendant in Error.

AM

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1885. No. 1,195.

CHARLES H. BROOKS, a citizen of the State of New York, who was sued with JOSIAH D. BROOKS, a citizen of the State of Pennsylvania, surviving partners with D. LEEDS MILLER, deceased, trading as BROOKS, MILLER & CO.,

Plaintiffs in Error,

vs.

EDWARD S. CLARK, a citizen of the State of Pennsylvania,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.

This is a writ of error brought to remove the record in the suit against the partnership firm of Brooks, Miller & Co., to reverse an order of remand made by the Circuit Court in a suit for a partnership debt brought against all the members of the firm for money loaned them by Edward S. Clark, the Defendant in Error.

The firm claimed to remove the cause under the last clause of Section 2 of the Act of March 3, 1875, namely:

"And when in any suit mentioned in this section there "shall be a controversy which is *wholly* between citizens of "different States and which can be fully determined as be- "tween *them*, then either one or more of the plaintiffs or "defendants actually interested in such controversy may re- "move said suit into the Circuit Court of the United States "for the proper district."

The order of removal was made at the instance of Charles H. Brooks, of New York, one of the three copartners, and who sues out this writ of error.

STATEMENT OF THE CASE.

This suit was for $15,500, money borrowed by the firm of Brooks, Miller & Co. of Clark.

The partnership was composed of Charles H. Brooks, of New York, and D. Leeds Miller and Josiah D. Brooks, of Pennsylvania. An affidavit of the items of loan was filed, taken from the firm books.

The appellant admits the original joint liability as partner, and that he was a member of the firm at the time of contracting the debt.

He is jointly liable as a partner, or not at all.

ARGUMENT.

The case of *Putnam* vs. *Ingraham*, 114 *U. S. Reports*, 57 (1884), is precisely the case in hand. If the law of that case prevails, then further argument is unnecessary.

In both cases were asserted joint liability as partners, separate defences set up, wholly severable as to the non-resident defendant, with judgment by default against one defendant.

Chief Justice Waite said (p. 59):

"The suit is brought against all the defendants jointly, "to recover upon what are alleged to be their joint promises "and undertakings. The defendants, who are not citizens "of Connecticut, have filed a separate answer, in which "they deny their liability altogether, and claim besides that, "if liable at all on part of the account sued for, it is not "jointly with the defendant Morgan. This is their *separate* "defence to the joint suit which Ingraham has elected to "bring against them and Morgan upon what he claims to "be the joint contracts of all the defendants. In Connecti-"cut, as in New York, 'judgment may be given for or "against one or more of several plaintiffs, and for or "against one or more of several defendants,' and in "addition to this the Court may, in Connecticut, 'deter-"mine the ultimate rights of the parties on each side "as between themselves, and grant to the defendant any "affirmative relief he may be entitled to.' But this, as we "have said in the case just decided, Ante 52, does not make "a joint contract several, nor divide a joint suit into separate "parts. The suit is still one, and indivisible for the pur-"poses of removal.

"The fact that Morgan has not answered, but is in *de-"fault*, is unimportant. The suit is still on joint causes of "action, and the plaintiff, if he sustains the allegations of

"his complaint at the trial, will be entitled to a joint judg-
"ment against all the defendants. The *default* places the
"parties in no different position with reference to a removal
"than they would occupy if Morgan had answered and set
"up an entirely different defense from that of the other de-
"fendants. A *separate controversy* is not introduced into the
"case by *separate defenses* to the same cause of action.

"As the petitioning defendants have asked no affirmative
"relief, either against the plaintiff or their co-defendant, no
"question can arise under the rule of practice in Connecti-
"cut, which allows the Court to determine the ultimate
"rights of the parties on each side as between themselves.
"In the present case the only controversy is as to the right
"of the plaintiff to recover against the defendants."

This is the latest definition of the Act. There are many others, all in harmony with it.

The Act of 1875 says: "In which there shall be a controversy which is wholly between citizens of different States."

This means that they must ALL be citizens (on one side) of different States from plaintiff's State.

100 *U. S. Rep.*, 457.

103 *Id.*, 336.

The contract and suit are joint, and defendants are not ALL citizens of other States than plaintiff, and suit cannot be removed.

Hyde vs. *Ruble*, 104 *U.S. Rep.*, 407, affirmed in *Winchester* vs. *Loud*, 108 *U. S. Rep.*, 130, and *Ayres* vs. *Watson*, 113 *U. S. Rep.*, 594.

The defendants must ALL be citizens of other States than plaintiff's LOCUS.

Removal Causes, 100 *U. S. Rep.*, 457.

Blake vs. *McKim*, 103 *Id.*, 336.

Shainwald vs. *Lewis*, 108 *Id.*, 158.

It must be a separate and distinct cause of action capable of separation into parts. If joint when begun cannot remove.

Frazer vs. *Jennison*, 106 *U. S. Rep.*, 191–5.

Ayres vs. *Wiswall*, 112 *Id.*, 192–3.

Field on Federal Courts, 173.

If joint liability is claimed, and one is a Pennsylvania citizen, Circuit Court has not jurisdiction. Even if not served he may appear and plead to jurisdiction.

Per Drummond J. Lovejoy vs. *Washburne*, 1 *Bissell*, 416.

" Where contract is joint as well as several, omissions to serve does not confer jurisdiction " (418).

Here Leeds Miller's executor is not served.

Railroad vs. *Letson*, 2 *Howard*, 556.

Shields vs. *Banon*, 17 *Id.*, 141.

In *Putnam* vs. *Ingraham*, 114 *U. S. Rep.*, 57 (1884). In Connecticut Ingraham sued Putnam and Earle, of New York, and Morgan, of Connecticut, as partners, Putnam, Earle & Co.

Putnam and Earle defended, and said it was Morgan's private debt before any partnership formed.

Morgan defaulted and judgment was rendered against him (pp. 58, 59). The Court said, the fact that Morgan has not answered, but is in default, is unimportant. Judgment is allowed by statute separately for default, but the suit is still on joint causes of action—default no difference—separate defence does not make separate cause of action. Only controversy is the right of plaintiff to recover against defendant.

L. & N. R. R. vs. *Ide* 114 *U. S. Rep.*, 52.

St. Louis & S. F. R. R. vs. *Wilson*, 114 *U. S. Rep.*, 60.

Separate answers and separate defences do not make separable controversies, and if one defendant is of the plaintiff's State, not removable.

(p. 55). Joint contractors—joint contract—must be separate cause of action, else not divisible.

As to the local statutes of Pennsylvania, if as was said in *Boyd* vs. *Gill*, 19 *Federal Rep.*, 148, "If a joint recovery is claimed upon a cause of action which justifies a joint recovery, then the 'controversy' is between the plaintiff and all the defendants."

The same local statute existed in Connecticut in *Putnam* vs. *Ingraham, supra*, of several liability in joint actions.

PIERCE ARCHER,
For Defendant in Error.